BRB No. 98-0105 BLA

SAMUEL M. SHORT Claimant-Respondent v. SHORT TRUCKING COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Richard A. Counts, Hindman, Kentucky, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with thirty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law

judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4)[1] and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits, which he ordered to commence as of April 1, 1994.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[2] Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). Lastly, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative

[1]The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).

[2]Employer does not challenge the administrative law judge's ultimate finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, employer does assert that the administrative law judge committed harmless error in weighing the x-ray evidence at 20 C.F.R. §718.202(a)(1) because the administrative law judge substituted his opinion for that of the physicians by interpreting two negative x-rays as positive.

law judge's Decision and Order.[3] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Baker, Broudy, Fino, Gish, Guberman, Lockey and Sundaram. Whereas Drs. Baker, Gish, Guberman and Sundaram opined that claimant suffers from pneumoconiosis, Director's Exhibits 41, 58, 60, 67; Employer's Exhibit 2, Drs. Broudy and Fino opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 62; Employer's Exhibits 1, 3. Dr. Lockey opined that claimant suffers from emphysema related to cigarette smoking. Director's Exhibits 38, 40, 53. Employer asserts that the administrative law judge erred by relying on the opinions of Drs. Baker, Gish, Guberman and Sundaram because they are based solely on discredited positive x-ray interpretations. Contrary to employer's assertion, Drs. Baker, Gish, Guberman and Sundaram based their opinions on physical examinations, smoking and coal mine employment histories and x-ray evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984);

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[3]Employer filed a brief in reply to claimant's brief which reiterates its prior contentions.

[4]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1)-(3), and 718.204(c)(2) and (c)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Ogozalek v. Director, OWCP, 5 BLR 1-309 (1982). An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, we reject employer's assertion that the administrative law judge erred in failing to explain why he accorded greater weight to the opinions of Drs. Baker, Gish, Guberman and Sundaram than to the contrary opinions of Drs. Broudy, Fino and Lockey, in view of the superior qualifications of Drs. Broudy, Fino and Lockey. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer also argues that the administrative law judge erroneously gave a mechanical preference to Dr. Gish's opinion because she treated claimant. Contrary to employer's assertion, the administrative law judge explained that Dr. Gish "performed a thorough examination over a significant period of time." Decision and Order at 10. Therefore, since the administrative law judge, within his discretion, provided a reasoned basis which indicates that he reflected on why the treating physician's medical opinion should be accorded greater weight than some of the other medical opinions of record, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), we reject employer's argument that the administrative law judge mechanically credited Dr. Gish's opinion as that of the miner's treating physician. Further, since the administrative law judge relied on the opinion of Dr. Gish in support of a finding of pneumoconiosis, by inference, he found the doctor's opinion sufficiently documented and reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Consequently, we reject employer's assertion that Dr. Gish's opinion is not well documented and reasoned. As observed by the administrative law judge, Dr. Gish's opinion is "[b]ased on over 30 years of both under and above ground coal mine employment, a smoking history of one pack of cigarettes per day for 25 years ending in 1982, an individual and family medical history, a symptomatology, chest x-rays, a pulmonary function study, an arterial blood gas study, blood tests, and a physical examination." Decision and Order at 5.

Furthermore, since the administrative law judge considered the smoking history referenced in the treatment notes of Dr. Gish and yet did not find that Dr.

Gish's opinion should be discredited,[5] *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), we reject employer's argument that the opinion of Dr. Gish must be discredited because Dr. Gish relied on an inaccurate smoking history. Additionally, since the resolution of inconsistencies within a medical report is a matter for an administrative law judge, we reject employer's assertion that the administrative law judge erred in considering Dr. Gish's opinion because it is equivocal. *See generally Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

In addition, employer asserts that the administrative law judge erred by discounting Dr. Fino's opinion because the doctor did not examine claimant. The administrative law judge observed that Dr. Fino "did not examine the Claimant, and only reviewed the medical evidence." Decision and Order at 10. An administrative law judge, within a proper exercise of his discretion as trier of fact, may discount the medical opinion of a physician who never conducted a physical examination of the miner. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). Thus, we reject employer's assertion that the administrative law judge erred by discounting Dr. Fino's opinion because Dr. Fino did not examine claimant. However, as argued by employer, the administrative law judge failed to consider the reports of Drs. Anderson and Wicker, and the deposition of Dr. Lockey. Dr. Wicker opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 12. Drs. Anderson and Lockey opined that claimant suffers from emphysema related to cigarette smoking. Director's Exhibits 48, 53. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of all of the relevant medical evidence of record thereunder. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

[5]The administrative law judge observed that Dr. Gish based her opinion on "a smoking history of one pack of cigarettes per day for 25 years ending in 1982." Decision and Order at 5.

Further, employer argues that the administrative law judge impermissibly substituted his opinion for that of Drs. Broudy and Lockey. Drs. Broudy and Lockey opined that claimant suffers from emphysema related to cigarette smoking. Director's Exhibits 38, 40, 53; Employer's Exhibit 1. The administrative law judge accorded "less weigh (sic) to the opinions of Drs. Broudy and Lockey because the Claimant stopped smoking in 1982, and he was not diagnosed as suffering from emphysema until more than ten years later." Decision and Order at 10. Hence, to the extent that the administrative law judge exceeded his expertise by commenting on the timing of a diagnosis of emphysema in relation to the date claimant ceased smoking cigarettes, the administrative law judge improperly substituted his opinion for that of the physicians. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Moreover, inasmuch as the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) may not be affirmed, we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). If reached, the administrative law judge must consider whether the evidence is sufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.[6]

[6]Inasmuch as the administrative law judge credited claimant with more than ten years of coal mine employment, claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment if claimant establishes the existence of pneumoconiosis. *See* 20 C.F.R. §718.203(b).

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). Specifically, employer asserts that the administrative law judge erred by failing to consider the physicians' opinions in light of the exertional demands of claimant's job as a coal truck driver. The administrative law judge stated that "[o]f the physicians who examined the Claimant, only Dr. Lockey did not address the issue of disability." Decision and Order at 12. The administrative law judge observed that "Drs. Baker, Broudy, Fino, Gish, Guberman, and Sundaram all found the Claimant had a totally disabling respiratory impairment."[7] *Id*. Although an administrative law judge, within his discretion as trier-of-fact, renders the ultimate finding of total disability through consideration of the exertional requirements of claimant's usual coal mine employment in conjunction with medical opinion evidence regarding the miner's physical abilities, *see Hvizdzak, supra*, the administrative law judge must provide an explanation for doing so, *see* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In the instant case, there is no indication that the administrative law judge compared the physicians' opinions with the exertional requirements of claimant's usual coal mine employment.[8] Thus, we vacate the administrative law judge's finding that the

[7]In fact, Dr. Baker specifically opined that claimant is unable to do any type of employment, and is only able to do self-care. Director's Exhibit 67. Dr. Broudy opined that claimant does not retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Employer's Exhibit 1. Dr. Fino opined that claimant suffers from a disabling respiratory impairment. Director's Exhibit 62. In a questionnaire dated December 27, 1995, Dr. Gish opined that claimant's respiratory impairment results in his inability to perform strenuous work. Director's Exhibit 60. In a subsequent deposition, Dr. Gish opined that claimant's impairment would prevent him from employment in his previous work as a miner or truck driver. Employer's Exhibit 2. Dr. Guberman opined that claimant is unable to perform light-duty work on a sustained basis. Director's Exhibit 58. Dr. Sundaram opined that claimant is unable to do hard manual labor expected of a miner. Director's Exhibit 41.

[8]The administrative law judge observed that "Claimant has credibly testified...that he was self-employed as a coal truck driver, hauling raw coal, and doing business as the Short Trucking Company." Decision and Order at 7. The record contains claimant's testimony regarding the exertional requirements of his usual coal mine employment. Hearing Transcript at 11-15, 26-28. In claimant's Description of Coal Mine Work form, claimant indicated that his duties as a truck driver included picking coal up at the mine and unloading it at the tipple. Director's Exhibit 8. Claimant also indicated that he was required to sit for twelve hours per

evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c),[9] and remand the case for further consideration of all of the relevant evidence of record.[10] *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 104 (1986); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). If reached, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c).[11] *See Fields, supra*;

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day. *Id*.

[9]Employer asserts that Dr. Gish's opinion is insufficient to establish total disability because it merely advises against further coal dust exposure. In the December 27, 1995 questionnaire, Dr. Gish opined that claimant's respiratory impairment results in his inability to perform strenuous work. Director's Exhibit 60. In a subsequent deposition, although Dr. Gish stated that claimant would not retain the respiratory and pulmonary capacity to do the work of a coal truck driver because claimant "has to climb in and out of the truck to sit in the truck and he would be exposed to environmental toxins, dusts, and so on," Employer's Exhibit 2 at 24, Dr. Gish nonetheless opined that claimant's physical limitations "preclude him from working as a miner or truck driver," *id*. at 23. Dr. Gish's opinion that claimant's physical limitations preclude him from working as a miner or truck driver may, if credited, support a finding that claimant is totally disabled. Moreover, Dr. Gish's opinion that claimant's respiratory impairment results in his inability to perform strenuous work may, if credited, and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894-96, 13 BLR 2-348, 2-356-58 (7th Cir. 1990); *cf. Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Thus, we reject employer's assertion that Dr. Gish's opinion is insufficient to establish total disability because it advises against further coal dust exposure.

[10]As previously noted, the administrative law judge failed to consider the reports of Drs. Anderson and Wicker, and the deposition testimony of Dr. Lockey. Dr. Anderson did not render an opinion with regard to total disability. Director's Exhibit 48. Dr. Wicker opined that claimant does not appear at this time to have the respiratory capacity to perform his previous occupation in the coal mining industry. Director's Exhibit 12. In the deposition, Dr. Lockey opined that claimant would have problems doing any more than mild physical activity. Director's Exhibit 53.

[11]Employer asserts that the administrative law judge erroneously failed to

Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Finally, inasmuch as we remand the case to the administrative law judge because of the administrative law judge's crediting and weighing of medical opinions, and because of the administrative law judge's failure to consider the opinions of Drs. Anderson, Wicker and Lockey, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). If reached, the administrative law judge must consider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

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consider a pulmonary function study dated March 13, 1995. Contrary to employer's assertion, the March 13, 1995 study is not relevant because this study does not contain FEV1 or MVV values. *See* 20 C.F.R. §718.204(c)(1); Director's Exhibit 41 A.

Administrative Appeals Judge